United States Court of Appeals

for the Second Circuit

APPENDIX

74-2194

IN THE

Supreme Court of the United States

FOR THE SECOND CIRCUIT

In The Matter of

ARBOR HOMES, INC.,
Bankrupt.

ALLAN RUBIN HOMES, INC., ALLAN RUBIN HOMES MILFORD, INC., and ALLAN RUBIN HOMES CLINTON, INC.
Claimants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
for the DISTRICT OF CONNECTICUT

APPENDIX TO BRIEF FOR APPELLANTS

PAGINATION AS IN ORIGINAL COPY

APPENDIX

Table of Contents

NAME OF BANKRUPT/DEBTOR: ARDOR HOMES, INC.

Last / First / Middle

ADDRESS OF BANKRUPT/DEBTOR (Number and Street): 1261 Meriden Road

CITY: Waterbury | ZONE | COUNTY: New Haven | STATE: Conn.

DIST. NO. | DIV. NO. | DOCKET NO.: 205 | 2 | H 10375

CHAPTER OR SECTION: Chap XI

DATE PETITION FILED: 8-16-71

DATE CLOSED:

DISCHARGE: Granted / Denied / Waived or not applied for

DATE DISCHARGED:

NATURE OF BUSINESS (Check one): Farmer, Real Estate, Professional, Other (Non-Business), Merchant, Manufacturer, Other (Business) X

PETITION DISMISSED: ☐ YES | DATE DISMISSED | CHAPTER UNDER WHICH CASE WAS PENDING WHEN DISMISSED

NAME OF JUDGE:

NAME OF REFEREE: Paul Goldman

NO. ASSET CASES ONLY — CLAIMS AS SCHEDULED | TOTAL | $ | $ | $

	NAMES AND ADDRESSES
ATTORNEY FOR PETITIONING DEBTOR	Herman K. Jellinghaus, Esq., 49 Leavenworth St., Waterbury, Conn. 06720
ATTORNEY FOR PETITIONING CREDITORS	Henry B. Cohen, Asst. U.S. Atty., 450 Main St., Hartford, Conn. 06103
RECEIVER	
ATTORNEY FOR RECEIVER	
TRUSTEE	
ATTORNEY FOR TRUSTEE	

CHANGES OF PRINCIPALS

DATE	PROCEEDINGS
8/16/71	Petition filed at 1:13 p.m. under Chap. XI of the Bankruptcy Act.
8/16/71	Order of Reference, entered. (Earl, C.)
8/16/71	Copy of Petition sent to Director of Internal Revenue, 450 Main St., Hartford, Conn. 06103, Special Procedures and Secretary of the Treasury, 15th & Pennsylvania Ave., N.W., Washington, D.C. 20220
1973 1/19/7 10/25	Deposition of Paul Posin filed in New Haven
	Certificate of Bankruptcy Judge on Petition for Review, filed. (Goldman, R.) m-10-25-73.
11/16	Opposition of the U.S. of America to Petition for Review, filed.
11/19	Hearing held on Petition for Review. Decision Reserved. Brief of State Mutual Life Ins. Co. of America filed by Jerome Caplan. (Clarie, J.) m-11/20/73.

(over)

FORM BK-74-D SEP 1962 (7-71)

UNITED STATES DISTRICT COURTS

☐ CHECK THIS BOX IF FILING FEES WERE PAID IN FULL AT TIME OF FILING

BANKRUPTCY DOCKET - COPY

A1

Ruling on Petition for Review, filed and entered. "The Order of the Referee in Bankruptcy is confirmed and it is So Ordered." (Clarie, J.) m-2/22/74. Copies mailed to Attys. Caplan & Wise and Judge Seidman.

2/8 Memorandum and Order Re: Claim of Allan Rubin Homes, Inc. et al. (Seidman, J.) Judgment - "Allan Rubin Homes, Inc. et al are indebted to the trustee in the amount of $250,000 plus interest from the date of filing, August 16, 1971." (Seidman, J.), filed.

2/8 Execution Writ (Markowski, C.) issued on the judgment rendered and other supporting documents or any banking institutions having in its possession boods or monies of the defendants, Allan Rubin Homes, Inc., Allan Rubin Homes, Milford, Inc. and Allan Rubin Homes, Clinton, Inc.

2/11 Motion for Appointment of Jacob G. Miller, indifferent person, to serve Execution Writ. So Ordered. (Markowski, C.) m-2/11/74

3/14 Brief of Trustee in Bankruptcy (Appellee) filed

3/18 Brief of Appellant (Gerald Brownstein, Esq.) filed

3/18 Record on Appeal in behalf of Allan Rubin Homes Inc. filed

6/3 Hearing on Appeal Review. Decision Reserved. (Clarie, J.)

9/3 Ruling on Petition for Review (Clarie, J.) m-9/4/74. "The order of the Bankruptcy Judge is confirmed. Petition for Review is denied." Copies mailed to Attys. Gerald Brownstein, Fred Rosnick, Ed. Marcus & Robert Burns.

7/5 Court Reporter's Notes of Proceedings held on June 3, 1974, filed in Hartford. (Sperber, R.)

9/6 Notice of Appeal filed by Robert P. Burns, Esq. Copies mailed to counsel.

9/6 Appeal Bond ($250.00).

12/5 Scheduling order issued

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

In The Matter Of:

ARBOR HOMES, INC.
Bankrupt

In Bankruptcy No. H 10375

MEMORANDUM AND ORDER RE: CLAIM OF ALLAN RUBIN HOMES, INC., ET AL

Arbor Homes, Inc. ("Arbor") for many years had been engaged in the manufacture of pre-cut components for homes. Allan Rubin Homes, Inc., Allan Rubin Homes Milford, Inc., and Allan Rubin Homes Cinton, Inc. were contractor-distributors of homes manufactured by Arbor. The three corporations were part of one operation controlled by Allan Rubin and will be referred to collectively as "Rubin". On August 16, 1971, a petition for an arrangement under Chapter XI of the Act was filed. Thereafter, on February 14, 1972, a proof of claim was filed in behalf of Rubin setting forth a debt of $3,040,459.28. The consideration was recited to be "see supporting Schedule 'A' " which was a copy of a dealership contract ("Agreement") between Arbor as manufacturer and Rubin as contractor. After filing, the debtor continued in possession and carried on the business for a period of several months until May 1, 1972, when it was adjudicated. Arbor had filed a cross-complaint against Rubin and counterclaimed for $3,000,000.00 which was amended to more than $300,000.00 and later amended to $700,000.00. After adjudication, the trustee continued the litigation and extended hearings were held.

Rubin's claim was not precise as to anything other than the amount claimed $3,040,459.28. This exact figure would

suggest a matured demand for precisely calculated damages. There is nothing to suggest it is predicated upon any future damages for a breach of contract. In fact, there is no such claim. No further amendment to Rubin's claim was filed. However, the parties seemed to assume that the claim included damages for breach of contract in addition to specific loss occasioned by failure of Arbor to perform, etc., and the hearings were conducted as though the pleadings properly set forth that claim.

Ultimately, the parties stipulated that the gross account receivable due on Arbor's counterclaim, as of the date of filing, August 16, 1971, was $397,000.00. The parties also stipulated that Rubin was entitled to a credit of $147,000.00 representing Rubin's cost to acquire materials which were not delivered by Arbor as required by the terms of the Agreement, leaving a net account receivable due to the trustee on its counterclaim of $250,000.00. This resolved all questions of money damages for individual transactions under the contract and left open only damages, if any, for a breach of the contract in its entirety. The parties further stipulated that the first matter to be determined by the court was whether such a breach occurred. Further proceedings are to be deferred until this judgment is rendered. If it is determined that there was a breach on the part of Rubin, judgment will enter in favor of the trustee for $250,000.00. Conversely, if it is determined that there had been a breach of agreement on the part of Arbor, further proceedings will be had to determine the amount of the damages, which in no event will exceed the stipulated sum of $250,000.00 due to the trustee. The Agreement dated November 10, 1962, was introduced into evidence as Exhibit A.

The parties had done business with each other since 1953. In the early years, both had used the name "Arbor Homes" in connection with their operation, and in 1962, each had pend-

ing an application before the United States Patent Office for registration of the trademark, "Arbor Homes". Each had developed a degree of good will in relation to the name, and the parties on November 10, 1962, entered into the Agreement. Although the corporate names of the parties may have changed during the ensuing period, the parties stipulated that Arbor and Rubin are the same parties as entered into the Agreement of November 10, 1962.

The initial term of the Agreement was for five years, but Rubin had options for four consecutive five-year renewals, for a total possible term of 25 years. In the Agreement, there is a great deal of emphasis on the use of the name "Arbor Homes", and detailed provisions as to the method of operation between the parties. Rubin was given an exclusive franchise for certain territory, and, in turn, he agreed to purchase and sell component homes only from the bankrupt. Of significance, is the emphasis which the parties placed upon arbitration to resolve any differences which might result from violation of the Agreement. Paragraph 11 of the Agreement provides in part:

> "11. In the event that any dispute shall arise as to whether or not there has been a violation of an essential term of the Agreement, by either party, such dispute shall be submitted to three arbitrators. . . ."

The balance of Paragraph 11 details the procedure for arbitration. Paragraph 12 provides in part:

> "12. Either party claiming to be aggrieved by the violation on the part of the other party of an essential term of this Agreement (except Arbor willfully discontinuing operations for 60 days) shall make such claim in accordance with the procedure hereafter stated, *which procedure shall be a condition precedent to the right of a party to recover damages or enforce any other remedies*

to which it may be entitled on the ground of breach of this Agreement." (Emphasis Added.)

These provisions for arbitration were not invoked at any time by either party prior to the date of filing, although Rubin did refer to Paragraph 12 in a letter dated May 20, 1971 (Exhibit E), and Arbor, as debtor-in-possession, invoked it by letter dated January 13, 1972 (Exhibit B).

There is no evidence that the Agreement of November 10, 1962, was ever modified by any agreement in writing, and since that date, the parties conducted themselves under the terms of the Agreement.

Paragraph 1(b) governs Rubin's option to renew the Agreement providing:

> "In the event that the contractor chooses to exercise any of its options as above, it shall notify the manufacturer of its intent to do so, in writing by registered mail, on or before 90 days prior to the expiration of the five-year period which may then be in existence."

There is no evidence that the first term, which would have expired on November 10, 1967, was ever extended by such notice in writing. The second and current renewal term would have expired on November 10, 1972. If, in fact, there was no written exercise of Rubin's option to extend the term of the contract, it might be questioned whether, in fact, there existed a binding contract between the parties on the date of filing. This question was not raised by the parties who apparently assumed that the contract had been properly extended. This presents the further question as to whether, if there was no written renewal, the parties could waive the requirement that the option be exercised in writing and by their conduct continue the life of a contract despite the specific requirement in the Agreement that the exercise of the option be in

writing. It would appear that the option clause was a formal covenant for renewal rather than an informal agreement for an extension, and would require the exercise of the option to be in writing, *Blanck* v. *Kimland Realty Co.*, 122 Conn. 317.

As was stated earlier, the parties had been doing business under the provisions of this contract since 1963. During this period from time to time, there were shortages in materials to be delivered, claimed violations as to the quality of the work delivered, problems as to the time schedule for delivery, etc. Apparently, the parties felt that these were normal incidents of a business relationship of the type enjoyed by the parties, and these questions were always resolved by conference between the parties. During the last several months, prior to the date of filing on August 16, 1971, the bankrupt had been experiencing financial problems. During this period, the backlog of accounts receivable from Rubin exceeded $475,000.00 and as was indicated earlier, credits claimed by Rubin totalled nearly $250,000.00. Rubin claims the accounts were not due and payable under the contract provisions for payment. Whether or not this position is justified, there was, by later agreement, $250,000.00 of "equity" due to Arbor and the inability to collect any part of this frozen asset had its obvious impact on a business which was short of capital. The bankrupt had become delinquent in payment of its federal taxes, and creditors were beginning to close in. The Internal Revenue Service levied on Rubin for $140,274.20. It was apparent that Arbor was not in a position to carry on its operations in the same manner and to the full extent which it had done during the early years of the contract. Even so, it was making deliveries of houses to Rubin up to a short time prior to the date of filing when houses ordered by Rubin were not scheduled for delivery, and sales were made only for cash to a third party. There is nothing to indicate that Arbor desired to terminate its contract with Rubin, its prime customer for many years.

During 1971, the parties had consulted their attorneys, and correspondence indicated that Rubin was of the opinion that the contract had been breached by Arbor. On May 20, 1971, counsel for Rubin wrote Arbor relative to claimed breaches, invoking Paragraph 12 of the Agreement, but, apparently, there was no serious follow-up, the parties merely continuing their practice of "negotiating" alleged violations. On August 12, 1971, counsel for Rubin notified Arbor that because of I.R.S.'s levy, it could not make further payments to Arbor. Counsel made clear that Rubin considered the contract still effective stating: "This, of course, can in no way be construed as a breach on part of the Rubin corporations of the contract between Arbor Homes, Inc. and said corporations . . . .", (Exhibit 7). No effort was made to invoke the arbitration clause which was required by the contract.

A few days later, on August 16, 1971, the date of filing under Chapter XI, the attorney for Rubin by letter advised the then debtor that it considered the agreement of November 10, 1962, terminated. The letter from Edward L. Marcus, attorney for Rubin, addressed to the president of Arbor reads as follows:

"August 16, 1971

Paul P. Posin, President
Arbor Homes, Inc.
1261 Meriden Road
Waterbury, Conn.

Re: Arbor Homes New Haven, Inc. et al

Dear Mr. Posin:

"My office has been notified that as of August 16, 1971, Arbor Homes, Inc. has filed a petition under Chapter 11 of the Federal Bankruptcy Act. In addition, I have

in my possession a letter from Allan Rubin Homes, Inc. indicating that at the present time Arbor Homes, Inc. has been requested to furnish some 25 homes to be delivered over the next fifteen days.

"As the result of the foregoing, it is clear that two situations exist, namely:

"a. Arbor Homes, Inc. is unable to deliver the homes referred to above, and hence the Rubin corporations in order to comply with their agreements with the various customers involved and within the intent of the underlying agreement of November 10, 1962, must in fact cancel said orders and seek deliveries elsewhere.

"b. In view of the filing of the petition in question, it is the position of the Rubin corporations referred to as the Contractor in said agreement of November 10, 1962, that said agreement has now been breached by Arbor Homes, Inc. so as to void the agreement in question.

"The arbitration procedure set forth in said agreement covers situations such as inadequacy of materials, poor workmanship and the like. In short, it is a grievance procedure. The provision relative to failure to manufacture and deliver within a sixty day period in fact relates only to the use of the name "Arbor".

"Your filing for protection under the bankruptcy act, however, constitutes a breach of the total agreement, it being an implied term of every contract that a party thereto will not permit itself to be disabled from making performance. The agreement between the parties provides in paragraph 13 that there may not be an assignment thereof. Chapter 11 in effect since it submits Arbor Homes, Inc. to the jurisdiction of the bankruptcy court, is an assignment of the agreement and breach of the provisions of Paragraph 13.

"In view of the foregoing, it is the position of the Rubin corporations in question that said agreement of November 10, 1962, as the result of the actions of Arbor Homes, Inc. has been repudiated by said Arbor Homes, Inc. and is therefor terminated.

Very truly yours,

Edward L. Marcus"

The letter from Attorney Marcus sets forth two claims of law: (1) that the filing of a petition under Chapter XI is an automatic breach of the contract, (2) that the filing of the petition under Chapter XI and the appointment of the debtor as debtor-in-possession was an assignment of the Agreement, and, therefore, a breach of provisions of Paragraph 13 of the Agreement. Neither of these claims of law is legally tenable and will be considered below.

The letter interprets the arbitration clauses in the agreement as covering "situations such as inadequacy of materials, poor workmanship and the like. In short, it is a grievance procedure. The provision relative to failure to manufacture and deliver within a 60-day period, in fact, relates only to the use of the name 'Arbor' ". This is a serious distortion of the arbitration clauses in the agreement. Paragraph 11 of the agreement recites that in the event of a dispute as to an essential term of the agreement, either party might invoke the arbitration procedure. The right to terminate could only result from a violation of one or more "essential terms" of the Agreement. Paragraph 12 repeated that either party claiming to be aggrieved by the violation on part of the other party of an essential term of the Agreement (excepting if either party ceased doing business for a period of 60 days which would be non-arbitrable) could involve arbitration in accordance with the procedure outlined in Paragraph 12. There was set forth a preliminary procedure of written notice

to the other party of the claimed violation and a 30-day period within which to cure the alleged violation, after which the aggrieved party would within ten days thereafter submit to arbitration the question of the violation. It further provided that after the decision of the arbitrators was submitted, the party at fault would have 30 days thereafter to comply with the order of the arbitrators. It was only at this point, if the party at fault failed to comply, that the agreement became terminated, after which the aggrieved party could bring suit for damages, etc. The question of the future use of the name did not become relevant until there was an award by arbitrators and failure to comply. Thereafter, the aggrieved party was given the right to utilize the name "Arbor" in its future business operations. (Par. 12(g)(h) of Exh. A). This is a far cry from the limited interpretation placed on arbitration by counsel for Rubin.

As of August 16, 1971, the parties were still doing business, or at least had a business relationship with each other which they considered was governed by the provisions of the Agreement of November 10, 1962. There had been multiple violations of various requirements of performance by Arbor, and the prospect of its being able to continue to perform under the terms of the Agreement was getting dimmer as with the passage of time. In turn, Arbor claimed Rubin was improperly withholding payments. Rubin was in a difficult business situation. Its sole supplier had reached a point where it could not perform adequately to supply its needs, and Rubin properly took whatever steps its business judgment indicated were necessary. These obviously would include seeking materials from other suppliers as it had in the past to a limited extent when there were violations by Arbor. The parties stipulated that this expense to Rubin amounted to $147,000.00. If he felt insecure, Rubin could have invoked § 42a-2-609(1) of the Connecticut General Statutes which provides:

> "(1) A contract for sale imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired. When reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until he receives such assurance may if commercially reasonable suspend any performance for which he has not already received the agreed return."

Instead of invoking the arbitration procedure required under the terms of the Agreement as a prerequisite to termination or the provisions of § 42a-2-609, Rubin unilaterally terminated the Agreement, giving as its reasons those set forth in the letter from Attorney Marcus, dated August 16, 1971.

It should be remembered that the filing by Arbor was under Chapter XI, seeking arrangement with creditors and a continuation of the business operation. On that date, there is no evidence that Arbor intended not to continue its operations or, in fact, to discontinue its relationship with Rubin. It had delayed the scheduling of delivery to homes to Rubin for two reasons: (1) whether justifiably or not it felt that Rubin was unfairly withholding payments on account of its obligation of $250,000.00 (the amount later stipulated), and (2) because of its shortage of capital, it found it necessary to sell its product for cash, which was available from another dealer. There was no evidence that this delay was a permanent course of action. Apparently, without authority, the person in charge of production relayed the information to Rubin who chose to so interpret the action without verification from Mr. Posin, the owner of Arbor and the only person who determined policy. Some of the orders which were not processed did not have the proper documentation which the parties described as "legal papers". The philosophy of Chapter XI is rehabilitation and a large percentage of the

cases that are filed ultimately present a plan to creditors which is confirmed and the business continues in operation. Had Rubin made available to Arbor the $250,000.00, or even the net due after withholding $140,274.20 on the I.R.S. levy, there is the possibility that the operations of the debtor-in-possession, under the contract with Rubin, could have continued. Free from the pressure from creditors, it would have had a chance. The unilateral termination of the Agreement by Rubin destroyed that opportunity.

As of the moment of filing, the contract between the parties (assuming it had been properly extended by written exercise of Rubin's option) was still controlling their relationship. There had been serious nonperformance by Arbor but no evidence that Arbor desired or intended to terminate the Agreement. Rubin claims that the nonperformance was of matters so essential to the contract that Rubin was privileged to terminate the Agreement which Rubin did after Arbor filed under Chapter XI. If there had been no provision for arbitration in the Agreement, this argument would be more cogent. It may be that had arbitration been involved, the contract might have been terminated in favor of Rubin. However, Rubin did not invoke the procedure required by the Agreement. Furthermore, prior to its termination of the Agreement, by letter dated August 16, 1971, Rubin had not made the claim that the contract had been fatally breached by Arbor and no longer existed. This theory was advanced for the first time in briefs. As of August 16, 1971, Rubin justified its unilateral termination of the Agreement by the *fact* of filing a petition under Chapter XI.

Filing a petition under the Bankruptcy Act does not automatically terminate executory contracts. If the case is filed under Chapters I-VII (liquidating bankruptcy), the trustee is required to file a statement of executory contracts he had assumed within 30 days after his qualification, Bank-

ruptcy Rule 607. Any contract not assumed within 60 days after qualification is deemed rejected. In Chapter XI a different procedure governs. The debtor is required to schedule his executory contracts. § 324(1) of the Act. The court has the power to permit the rejection of executory contracts, § 313(1), and the debtor in his plan may provide for the rejection of an executory contract; § 357(2). Unless an executory contract is rejected, it stays in effect. In 8 *Collier on Bankruptcy*, Paragraph 3.15(6). The Treatise says:

> "Whether the debtor is in possession, or whether there is a receiver or trustee, the contract can be rejected only by affirmative action under § 313(1) or § 357(2). Unless so rejected, the contract continues in effect."

Clearly, filing the petition for an arrangement was not per se a breach of contract.

Of even less cogency is the claim that the filing is an assignment of the contract. The only effect of filing under Chapter XI is to place the operation of the debtor's business under the control of the court. The debtor-in-possession is not a different person. The term merely describes the status of the *debtor* when no receiver or trustee is appointed. The debtor merely continues "in posession of his property". § 343. The exercise of his title to property is subject to the control of the court. As stated in the previous paragraph, his executory contracts remain in force unless rejected. See *Consolidated Gas, Electric Light & Power Co. of Baltimore* v. *United Railways and Electric Co. of Baltimore* (4th Cir. 1936) 85 F2d 799, 805, 30 Am. B.R. (N.S.) 555, 31 Am. B.R. (N.S.) 758, 761, 726, Cert. den. (1937) 300 U.S. 663, 57 S. Ct. 493, 81 L. Ed. 871, where the court said:

> ". . . . the distinction between the ordinary proceeding in bankruptcy and a proceeding under § 77B for corporate reorganization is significant. Bankruptcy contem-

plates the sale of the bankrupt's property and a distribution of the proceeds to the creditor; and the intervention of bankruptcy constitutes a breach of an executory contract, if the trustee does not elect to assume its performance, and gives rise to a provable claim. *Central Trust Co.* v. *Chicago Auditorium, supra.* Section 77B, on the other hand, does not contemplate the surrender and sale of the debtor's assets, but rather the transfer of the property, including executory contracts and leasehold estates not affirmatively rejected, or a reorganized body for the continuance of the business. An executory contract, therefore, remains in force in a proceeding under Section 77B until it is rejected, and unless rejected, it passes with other property of the debtor to the reorganized corporation." (Section 77B was the predecessor of Chapter XI. In Chapter XI, the debtor continues to exist after confirmation of an arrangement. There is no interruption of its corporate existence or title to property, only the control of operations being surrendered to the court.)

Rubin questions whether in the bankruptcy process arbitration would be permitted. Section 26 authorizes the court to direct the trustee to submit to arbitration any controversy arising in the administration of an estate and § 342 gives the debtor-in-possession all of the powers of a trustee. Furthermore, General Order 33 provides:

> "Whenever a . . . . debtor-in-possession shall make application to the court for authority to submit to arbitration any controversy . . . . . the application shall clearly . . . set forth the subject matter . . . . and the reasons why it is proper and for the best interest of the estate that the controversy should be settled by arbitration . . . ."

The authority clearly is in the court to direct arbitration, and it would appear that the controversy is one which properly

should have been arbitrated particularly since it is a provision of the contract and the express intent of the contracting parties. Rubin's rejection of the contract on the date of filing made this question academic. Had Arbor desired to bring action for breach of contract, it, too, would have had to go the arbitration route as a condition precedent to suing for damages.

Rubin argues that despite the provisions for arbitration in the Agreement, he had a right to proceed as he did; citing *Batter Building Materials Co.* v. *Krischner,* 142 Conn. 1. In that case, an action was brought for the reasonable value of labor and material furnished in the construction of a house. The defendant, dissatisfied with the work, had ordered the plaintiff off the job. The contract provided for arbitration. At issue was the question whether the plaintiff could proceed with the law suit without submitting the matter to arbitration. The plaintiff claimed that the defendant had totally repudiated the contract, and, therefore, arbitration was not necessary. The court clearly stated that, adopting the British view, a

> "repudiation or total breach of contract, whether acquiesced in by the other party or not, does not abrogate the contract, though it may relieve the injured party from further fulfillment of his contractual obligations. The contract is not put out of existence, though all further performance of the obligations thereunder by each party in favor of the other may cease. It survives for the purpose of measuring the claims arising out of the breach, and the arbitration clause survives determining the mode of settlement. The purposes of the

contract have failed, but the arbitration clause is not one of the purposes of the contract." 142 Conn. at Page 10.

Counsel also argues that there is no obligation to arbitrate any matters other than those provided for in the agreement, citing *Batter* (supra) and *Frager* v. *Pennsylvania General Ins. Co.,* 155 Conn. 270. The court cannot quarrel with the proposition of law expounded. However, a careful reading of the Agreement suggests that the parties contemplated the arbitration procedure as a means of resolving any disputes relative to their contractual obligations. The term of the Agreement is recited in Paragraph 1(a) as "a total of 25 years including the original term, subject, however, to termination in accordance with any of the procedures for termination expressly set forth in this Agreement". Subsection (c) provides: "nothing herein contained shall affect the rights of termination as hereinafter provides". Paragraph 2(b) refers to the rights of the parties to use the name Arbor which "shall accrue upon termination of this Agreement as hereinafter provided in Paragraph 11 and 12". Subsection (c) provides that if Rubin "shall fail to be active in the business of selling prefabricated buildings for a period of 60 days", the right to use the name "Arbor" shall "simultaneously terminate and lapse forever". Similarly, Subsection (d) provides that if the manufacturer "shall fail to be active in the business of manufacturing prefabricated buildings for a period of 60 days", Rubin would have the right to use the name "Arbor".

Other than the foregoing references to termination, Paragraphs 11 and 12 contain the Agreement of the parties, which, basically, require: (a) that any dispute as to whether

or not there has been a violation of an essential term of the Agreement shall be arbitrated, and, (b) such arbitration is a condition precedent to the right of a party to recover damages or enforce any other remedies. Finally, Paragraph 12(d) of the Agreement provides for termination of the agreement if the party against whom the claim is made fails to follow or comply with the arbitration procedure or findings.

The court is convinced that the issue of whether the grievances which Rubin alleged were sufficient to justify his termination of the contract unilaterally was arbitrable, and arbitration of any claim for damages based on an alleged termination of the contract by Arbor's action was a condition precedent to making such claim. Having not availed himself of the mandatory arbitration process, Rubin cannot make a claim for damages for breach of the Agreement.

Rubin also argues that the requirement for abitration was waived by the action of the parties. While it is true that for a number of years the parties did not invoke the arbitration provisions of their Agreement, choosing instead to negotiate comparatively minor violations of the terms of the contract, this of itself would not constitute a conscious waiver of the provisions requiring arbitration. As stated above, as late as May 20, 1971, Attorney Marcus, in behalf of Rubin, invoked the arbitration clause by giving Arbor notice of alleged violations which, under the terms of the agreement, were required to be corrected within 30 days. Rubin did not thereafter invoke the balance of the arbitration procedure after June 20, 1971. As was argued by counsel for Rubin in his brief, the arbitration procedure was time-consuming, and the exigencies of the situation in the opinion of the parties required resolu-

tion by negotiation. When, ultimately, Arbor learned of alleged violations of restrictive covenants in the agreement, it did invoke the arbitration procedure. This took place many months after the Chapter XI case had been filed and may not have been appropriate at that time without the court's permission. However, it does indicate that so far as Arbor was concerned, it considered the arbitration clause an essential part of the Agreement and did not, by the same token, waive those provisions of the Agreement. It is found that there was no waiver of the requirement of arbitration.

In summary, it is concluded that the Agreement was designed to avoid termination of the contract for simple violation of performance, and Paragraphs 11 and 12 relating to arbitration were binding upon the parties as of the date of filing under Chapter XI on August 16, 1971. Both parties were bound to seek arbitration for alleged violations of essential terms of the Agreement. Not having invoked arbitration, Rubin could not "recover damages or enforce any remedies to which it (might) be entitled on the ground of breach of (the) Agreement." (Paragraph 12 of Exh. A). It is further found that (a) there was no anticipatory breach of the Agreement by Arbor prior to August 16, 1971, (b) filing a petition for an arrangement by Arbor under the provisions of Chapter XI of the Act was not a breach of the Agreement, and (c) the filing under Chapter XI was not an assignment of the Agreement by operation of law. Accordingly, it is determined that the unilateral termination of the Agreement by Rubin on August 16, 1971, was not warranted, Rubin's claim for damages for breach of the contract is denied, and judgment may enter for the trustee to recover $250,000.00 plus interest from August 16, 1971, against Allan Rubin Homes, Inc., Allan

Rubin Homes Milford, Inc., and Allan Rubin Homes Clinton, Inc. It is

SO ORDERED.

Dated at Hartford, Connecticut, this 8th day of January, 1974.

SAUL SEIDMAN
Bankruptcy Judge

CC: EDWARD L. MARCUS, ESQ.
FRED B. ROSNICK, ESQ.
HARRY L. WISE, ESQ.
ROSENBERG, ROME & BARNETT, ESQS.

I certify that this is a true copy.
Attest: Martha Brown
Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

In The Matter Of:

ARBOR HOMES, INC.
Bankrupt

In Bankruptcy No. H 10375

JUDGMENT

This action for a determination of the claim of Allen Rubin Homes, Inc., et al, and the counterclaim of the trustee came on for hearing before the court, Honorable Saul Seidman, Bankruptcy Judge, presiding, and the issues having been duly heard and a decision having been rendered, it is

ORDERED AND ADJUDGED that Allan Rubin Homes, Inc., Allan Rubin Homes Milford, Inc., and Allan Rubin Homes Clinton, Inc. are indebted to the trustee in the amount of $250,000.00 plus interest from the date of filing, August 16, 1971. Judgment is hereby entered in that amount.

Dated at Hartford, Connecticut, this 8th day of January, 1973.

SAUL SEIDMAN
Bankruptcy Judge

By: Celeste C. Doyle
Chief Clerk

I certify that this is a true copy.
Attest: Martha Brown
Clerk

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

In The Matter Of:

ARBOR HOMES, INC.

In Bankruptcy No. H 10375

February 31, 1974

APPELLANTS' DESIGNATION OF CONTENTS FOR INCLUSION IN THE RECORD ON APPEAL AND A STATEMENT OF ISSUES TO BE PRESENTED ON THE APPEAL.

Allan Rubin Homes, Inc. et als, appellant, herewith files a designation of the contents for inclusion in the record on appeal:

a. transcript dated April 10, 1972;
transcript dated April 25, 1972;
transcript dated April 26, 1972;
transcript dated July 14, 1972.

b. Exhibit "A" — Franchise Agreement dated November 10, 1962;
Exhibit "4" — List of shortages dated June 17, 1971;
Exhibit "D" — Letter dated August 11, 1971 from Edward Greeley to Joseph Mucci;
Exhibit "F" — dated August 10, 1971 — letter from Attorney Edward Marcus to Paul Posin;
Exhibit "6" — Notice of Levy dated August 10, 1971;
Exhibit "7" — a series of letters from Attorney Marcus to Paul Posin and letter from Mrs. Fritz;

Exhibit "8" — letter from Attorney Marcus to Paul Posin dated August 16, 1971;

Exhibit "10" — Debtor-in-Possession Order dated August 16, 1971.

c. Memorandum and Order re: Claim of Allan Rubin Homes, Inc. et al dated January 8, 1974.

Said appellants intend to present the following issues on the appeal:

1. Did the Bankruptcy Judge err in concluding that there had not been a material breach and repudiation of the Franchise Agreement by Arbor Homes Inc. prior to its filing of the Chapter XI Proceeding which terminated the relationship between the parties and entitled Allan Rubin Homes, Inc. et als to damages?

2. Did the Bankruptcy Judge err in concluding that in the event of any breach of contract, Allan Rubin Homes, Inc. et als must first resort to arbitration proceedings before being entitled to claim damages?

3. Did the Bankruptcy Judge err in concluding that in the event of any breach of contract Allan Rubin Homes, Inc. et als must first invoke the provisions of 42a-2-609 of the Uniform Commercial Code before being entitled to claim damages?

4. Did the Bankruptcy Judge err in concluding that Allan Rubin Homes, Inc. et als had not in fact invoked the provisions of 42a-2-609 of the Uniform Commercial Code?

5. Did the Bankruptcy Judge err in failing to find that the parties could waive arbitration requirements by their conduct?

6. Did the Bankruptcy Judge err in failing to find that the parties had in fact waived the arbitration requirement?

7. Did the Bankruptcy Judge err in concluding that Allan Rubin Homes Inc. et als were not enjoined from invoking the arbitration procedure by reason of the general restraining provisions of the debtor-in-possession Operating Order?

Dated at New Haven, Connecticut, this 13th day of February, 1974.

ALLAN RUBIN HOMES, INC. ET ALS

By: GERALD W. BROWNSTEIN
Their Attorney

Certification:

This is to certify that a copy of the Appellants' Designation of the Contents for Inclusion in the Record on Appeal and a Statement of Issues to be Presented on the Appeal was deposited in the United States Mails, Postage Prepaid, addressed to Fred B. Rosnick, Esquire, Weisman & Weisman & Rosnick, 49 Leavenworth Street, Waterbury, Connecticut, this 13th day of February, 1974.

GERALD W. BROWNSTEIN
Attorney for the Appellants

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Sept. 3, 1974

In The Matter Of:

ARBOR HOMES, INC.
Bankrupt

In Bankruptcy No. H 10375

RULING ON PETITION FOR REVIEW

This case comes before the Court on a petition for the review of an order of the Referee in Bankruptcy, filed January 8, 1973. Prior to the Referee's hearing on the breach of contract issues, the parties entered into two stipulations; the first dated April 12, 1972, agreed that the gross amount due Arbor Homes, Inc., the bankrupt-debtor, from the claimants, Allan Rubin Homes, Inc., Allan Rubin Homes Milford, Inc., and Allan Rubin Homes Clinton, Inc., (hereinafter collectively called the "Claimant"), was $397,000; and in a second stipulation dated March 1973, the parties agreed to a set-off of $147,000, in favor of the Claimant, which represented the cost of acquiring materials not provided by the Bankrupt under the terms of its agreement. These agreed-to figures established a net receivable due to Arbor of $250,000. However, Paragraph 6 of the latter stipulation reserved to the Claimant the right to assert and prosecute its claim for damages, entirely separate and in addition to the set-off claims as hereinbefore stated.

The parties agreed that the Bankruptcy Judge should first decide whether or not there had been a breach of contract by either party to the November 10, 1962 Agreement, bankrupt-

debtor's Exhibit A. If it were decided that the Claimant caused the breach, then judgment should enter in favor of the Bankrupt-Arbor for the agreed balance of the amount due, $250,000; but if the Court adjudged that the Bankrupt-Arbor breached the contract agreement, further hearings would be held by the Bankruptcy Judge on the amount of damages which were caused to the Claimant. Said damages could then be deducted from the $250,000 account receivable due to Arbor from the Claimant, but in no event could such damages exceed that sum.

After complete hearings on the factual issues, the Bankruptcy Judge found the following:

> "that the unilateral termination of the Agreement by Rubin on August 16, 1971, was not warranted, Rubin's claim for damages for breach of the contract is denied, and judgment may enter for the trustee to recover $250,000.00 plus interest from August 16, 1971, against Allan Rubin Homes, Inc., Allan Rubin Homes Milford, Inc., and Allan Rubin Homes Clinton, Inc. . . . ."

The Court having reviewed all the exhibits, the depositions, the scholarly briefs submitted by the respective parties, the memorandum and order, together with the entire record herein, and being of the opinion that the Petition for Review should be denied and that the order of the Bankruptcy Judge should be confirmed; it is

ORDERED: that said Petition for Review be, and the same is hereby denied for the reasons set out in the well considered Memorandum of the Bankruptcy Judge, dated January 8, 1974; and it is further

ORDERED: that said order of the Bankruptcy Judge be, and the same hereby is, confirmed.

Dated at Hartford, Connecticut, this 3rd day of September, 1974.

T. EMMET CLARIE
Chief Judge

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

In The Matter Of:

ARBOR HOMES, INC.
ARBOR MODULES, INC.
ARCREST ERECTORS, INC.
Debtor

In Proceedings for an Arrangement Under Chapter XI
Nos. H10375, H10414, H10413

April 12, 1972

STIPULATION

Allan Rubin Homes, Inc., Allan Rubin Homes Milford, Inc., formerly known as Arbor Homes New Haven, Inc., and Allan Rubin Homes Clinton, Inc., formerly known as Arbor Homes Clinton, Inc., hereinafter known as "the Rubin Corporations," and Arbor Homes, Inc., Arbor Modules, Inc., and Arcrest Erectors, Inc., hereinafter known as Arbor Homes, acting by their duly respective agents, agree and stipulate as follows:

1. All law suits pending between Arbor Homes and the Rubin Corporations other than the matters pending before the Bankruptcy Court shall be withdrawn forthwith.

2. Arbor Homes and the Rubin Corporations will execute and deliver mutual releases for all claims or actions pending between the parties except for the matters pending before this Bankruptcy Court and shall execute releases of attachment or garnishment as to all pending law suits without any requirement that the Rubin Corporations post bond for such releases.

3. Arbor Homes and the Rubin Corporations will be heard by the Bankruptcy Court on two issues:

(a) What amount may be due and owing from the Rubin Corporations to Arbor Homes, but Arbor Homes shall not be entitled to any recovery in excess of $397,000.00.

(b) What amount may be due and owing from Arbor Homes to the Rubin Corporations which, if any, shall be set off against the sums found by the Bankruptcy Court to be due from the Rubin Corporations to Arbor Homes, the intention of the parties hereto being that in no event shall the Rubin Corporations be entitled to a Money Judgment against Arbor Homes.

4. Allan Rubin shall forthwith execute and deliver a guaranty agreement to Arbor Homes, binding himself individually to pay any judgment which may be entered by this Bankruptcy Court in favor of Arbor Homes as against the Rubin Corporations, which judgment or any portion thereof the Rubin Corporations shall fail to pay to Arbor Homes.

5. Arbor Homes shall forthwith execute and deliver to Allan Rubin, Dante Molinari, Joseph Mucci, Stanley Bak and Artisans, Makers of Fine Homes, Inc., a release of any and all claims which it has against them from the beginning of the world to the date of these presents other than the following:

(a) Any rights it has against Allan Rubin and the Rubin Corporations under the terms of this Stipulation.

(b) Any claims for monies due from materials purchased from Arbor Homes, by Dante Molinari, Joseph Mucci and Stanley Bak.

(c) Any monies due for improper use of credit cards of Arbor Homes by Dante Molinari, Joseph Mucci and Stanley Bak.

6. As a condition to the preceding paragraph relating to Dante Molinari, Joseph Mucci, Stanley Bak and Artisans, Makers of Fine Homes, Inc., the Rubin Corporations shall obtain from Artisans, Makers of Fine Homes, Inc., Daniel Molinaro, Joseph Mucci and Stanley Bak a release of any claims which they have or may claim against Arbor Homes from the beginning of the world until the date of these presents.

ARBOR HOMES, INC.

By Paul P. Posin
Its

ARBOR MODULES, INC.
By Paul P. Posin
Its

ARCREST ERECTORS, INC.
By Paul P. Posin
Its

ALLAN RUBIN HOMES, INC
By Allan Rubin
Its

ALLAN RUBIN HOMES CLINTON. INC.
By Allan Rubin
Its

ALLAN RUBIN HOMES MILFORD, INC.
By Allan Rubin
Its

ALLAN RUBIN

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

In The Matter Of:

ARBOR HOMES, INC.
ARCREST ERECTORS, INC.
ARBOR MODULES, INC.
Debtor

In Proceedings for an Arrangement Under Chapter XI
Nos. H10375, H10414, H10413

March , 1973

STIPULATION

Allan Rubin Homes, Inc., Allan Rubin Homes Milford, Inc., formerly known as Arbor Homes New Haven, Inc., and Allan Rubin Homes Clinton, Inc., formerly known as Arbor Homes Clinton, Inc., hereinafter collectively known as the "Claimant", and Arbor Homes, Inc., Arbor Modules, Inc. and Arcrest Erectors, Inc., hereinafter known as the "Bankrupt", acting by their duly authorized respective agents or representatives, agree and stipulate as follows:

1. As of August 16, 1971, the gross amount receivable of the claimant, to the Bankrupt, was $397,000.00, which on said date was subject to a credit in the amount of the Claimant's cost to acquire materials which were never delivered by the Bankrupt with the shipments of goods that were the basis for said account receivable.

2. The cost to the Claimant to acquire the aforesaid materials was $147,000.00, and the net account receivable from the Claimant to the Bankrupt, as of August 16, 1971 is $250,000.00.

3. The Claimant has made no payment on account of said net account receivable.

4. The determination of the credit, as set forth in paragraph 2 of this Stipulation, was arrived at by negotiations between the parties, and a condition thereof was that the Claimant assign, and the Claimant herewith does assign to the Bankrupt, all of its right, title and interest, in three certain causes of action in which the Claimant is, or may be, plaintiff, to the extent that the Claimant may or might recover certain sums which it owed, or might have owed, the Bankrupt for materials sold to respective customers of the Claimant to wit:

(a) Albert E. Storrs, New Hartford, Conn.	$1,250.00
(b) Leslie Netze, et ux, Groton, Conn.	7,032.00
(c) Lukcso (a/k/a Lubsco), Thomaston, Conn.	5,878.60

5. In conjunction with the foregoing paragraph 4, the parties recognize that the Netze matter in suit also involves a claim by the Claimant against the customer for the cost of a foundation and for shell erection, and the Bankrupt agrees to prosecute said action and to reimburse the Claimant with such funds as it may recover for work performed by the Claimant as aforesaid, less a reasonable attorney's fee.

6. Nothing contained in this Stipulation shall be deemed to limit the right of the Claimant to continue to assert and prosecute its claims for damages (specifically excluding its claim to set off against the account receivable its cost to acquire materials not delivered by the Bankrupt), against the Bankrupt, as set forth in Proof of Claim filed in this Court by the Claimant on February 12, 1972, subject however to the

Stipulation dated April 12 1972 filed in this Court by the parties hereto, in proceedings for an arrangement under Chapter XI, Nos. H10375, H10414, H10413.

7. The transcript of testimony of Paul P. Posin taken at a deposition on October 24, 1972, shall be deemed to have been filed in Court as an exhibit of the Claimant, and the Court shall be entitled to treat the testimony therein in the same manner as though the Court had heard said testimony in open court.

8. It is further stipulated and agreed that the parties to this action have rested with respect to production of evidence as to whether or not there was a breach, by either party, of the November 10, 1962 Agreement, Bankrupt's (Debtor's) Exhibit A, and that further proceedings in this matter shall be deferred until such time as the Court shall render judgment as to whether or not there was a breach of said Agreement by one of the parties, and further, that if the Court shall adjudge that there was a breach of said Agreement on the part of the Claimant, judgment may enter in favor of the Bankrupt on the basis of an account receivable due from the Claimant in the amount of $250,000.00, and if the Court shall adjudge that there was a breach of said Agreement on the part of the Bankrupt, proceedings will be resumed on the question of damages caused to the Claimant by the Bankrupt by virtue of such breach, and if the Court finds that there was such damage, and the amount thereof, such amount shall be deducted from the account receivable of $250,000.00 and judgment may enter on the basis of such finding.

Allan Rubin, as Guarantor of payment of any judgment

that may enter against the Claimant, hereby consents to the within stipulation.

BANKRUPT

ARBOR HOMES, INC.
By Harry L. Wise,
Its Trustee
in Bankruptcy

CLAIMANT

ALLAN RUBIN HOMES, INC.
By Allan Rubin, President

ALLAN RUBIN HOMES
MILFORD, INC.
By Allan Rubin, President

ALLAN RUBIN HOMES
CLINTON, INC.
By Allan Rubin, President
Allan Rubin, Guarantor